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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LARS DARWYN PAARMANN, Defendant and Appellant.	2d Crim. No. B215163 (Super. Ct. No. F415399) (San Luis Obispo County)

In an amended information, Lars Darwyn Paarmann was charged with one count of oral copulation/sexual penetration of a child ten years of age or younger (count 1, Pen. Code, § 288.7, subd. (b)); and nine counts of lewd acts upon a child (counts 2-10, § 288, subd. (a)).[1] The acts were alleged to have occurred over a six-month period, and the allegations in counts 2 through10 were identical.

Appellant was convicted by jury on all 10 counts. The trial court sentenced him to state prison for a term of 15 years to life on count 1, and imposed the upper term of 8 years on count 2, and 2 years (one-third the middle term) on each of the remaining 8 counts. All counts were to run consecutively, for a total aggregate term of 39 years to life. Appellant asserts the trial court violated its sua sponte duty to give a modified

[1] All further statutory references are to the Penal Code unless otherwise stated.

unanimity instruction (CALCRIM No. 3501), admitted hearsay evidence, and claims the ineffective assistance of counsel. We affirm.

FACTS

Telephone Conversation Between Appellant and J.M.'s Mother

J.M. is the four-year-old daughter of "Jodi" and "Jason," who no longer live together. J.M. and her brother, who is three years older, reside with Jodi in Atascadero. At the time the offenses were committed, they lived in a duplex next door to appellant, who is 60 years old. Appellant did not have a bed in his room and slept on the closet floor.

In December 2007, Jason picked up the children for a visit. J.M. told her father that appellant was a neighbor and her best friend. She visited his house where they watched movies and ate popcorn in his bed. Jason asked his daughter what kind of clothes she wore in bed, and she said she wore her "chones," or underwear. She said that she and appellant loved each other. J.M. told her father that appellant said it was alright for best friends to kiss on the mouth and that best friends do not tell things to mommies and daddies. Jason contacted the Atascadero police department.

At the direction of Detective Matthew Aarnaud, Jodi called appellant, and their conversation was recorded. Appellant told Jodi that J.M. had asked him if he had any explicit materials. She once squeezed him "through material." She was precocious and looking forward to things that might happen someday. J.M. asked appellant to touch her and he told her he could not do that. She sometimes visited him wearing a skirt but no panties. He once had to wash her because she had gone to the bathroom and was a little "sticky." He had to boost her up to the sink "by her butt." He splashed some water on her, and left her panties at the foot of the sink. On another occasion, he lifted her up on the closet shelf and she began using a vibrator that belonged to Jodi. She used it between her legs while appellant watched. Appellant said J.M. said she would like to have sex with him, but did not realize he will be an old man by then.

Interview with J.M. by Traci Nix

Traci Nix is a child forensic interview specialist for the district attorney's office. J.M. told Nix that she and appellant love each other. He kissed her on the lips. He has touched her "pee pee" under her panties with his finger. Appellant also kissed it. She did not like it and told him "no." Nix gave J.M. an anatomical drawing and she drew pink circles around the body parts where appellant had touched her, which she identified as "pee pee," "boobies" and "booty."

Interview with Appellant by Detective Matthew Aanerud

Detective Aanerud interviewed appellant both at his house and the police station. Appellant said that J.M. was like a daughter to him. He loves her and would die for her. They watched movies and cuddled together and kissed on the lips a lot.

Appellant was once at J.M.'s house when she took him to the bathroom. He lifted her up to wash her hands and noticed her legs felt "sticky." He thought she had an accident and splashed water against her and wiped her legs off on the inside. He put her panties in a plastic container at the base of the sink. On his birthday, J.M. wanted to give appellant a present, and she pulled down her pants and asked him to lick her butthole. He explained about germs and told her they could not do that. She rolled over and he kissed her vagina. His tongue may have penetrated the lips of her vagina.

J.M. would place appellant's hand on her body where she wanted to be touched. Once she put his hand on her vagina. He was flattered since he is a 60-year-old man. She did not want him to do it when they were watching television at her house. If he brushed that area, she would say, "No." There were a couple other times when he brushed her there. Appellant knew J.M. sometimes did not wear panties because she would sit on the bathroom counter in a miniskirt and shave him. J.M. liked to climb on things and appellant often had to boost her up with one hand. He placed his fingers near her vagina and thumb near her buttocks. It is possible that his finger went partly into her vagina, through her pants, when he was lifting her up somewhere.

J.M. told appellant that she wanted to have sex with him. It bothered him that she did not say "make love" because "have sex" sounded so impersonal. She had

seen him naked because she had entered the bathroom while he was urinating. Appellant told the detective that, if he had a girlfriend, he would almost feel like he was cheating on J.M. Once he was wearing something tight, and she noticed a bulge and "squeezed [him] a couple times real hard."

J.M. asked appellant if he had any explicit material and he told her he did not have that kind of stuff. Jodi had an electric vibrator that was not for sexual purposes. J.M. asked appellant to boost her up into the top shelf of her closet and began rubbing the vibrator against herself. He had to stand and watch to make sure her mother did not see her. Appellant did not think J.M. had an orgasm, she was just curious and wanted to know how it felt.

Trial Testimony

Much of J.M.'s testimony was vague or contradictory. She testified that she and appellant kissed when they were watching movies and he would put his hand on her heart. She also testified that appellant hugged her, but did not kiss or touch her. J.M. said that he kissed her on the lips. She said that she remembered telling Nix that appellant had touched her "pee pee" on the bed. She told appellant that it was not okay to touch her there. He touched her "booty" under her clothes, more than once. J.M. testified that he kissed her "pee pee" twice. Appellant would lift her up so she could see things and put her on the sink while he brushed his teeth.

J.M.'s videotaped interview with Nix was played for the jury. After viewing the tape, the prosecutor asked J.M. whether appellant had picked her up to reach the "neck massager." She answered both yes and no. She said that she did not use the neck massager, but appellant used it at his house.

J.M's brother testified that he had once seen his sister running from appellant's house wearing just her underwear. Another time he saw J.M. in appellant's house, wearing just underwear and a t-shirt. On a third occasion, J.M. was wearing only underwear when she jumped over a fence, knocked on appellant's back door, and went inside.

Appellant chose to testify, against the advice of his counsel. He said that he loved J.M. and they "had some kind of connection." He kissed her on the lips and "tummy button" and toes. Sometimes he kissed her on the lips when his hand was touching her body. Appellant testified that, for his birthday, J.M. offered him her "butt hole." He told her that it was inappropriate, and she became despondent. Appellant said that he could not stand to see her cry and wanted to make her feel better. She rolled over and he kissed the air near her vagina. Appellant testified that J.M. liked to shave him. He would lift her onto the bathroom sink and noticed she wore no underwear because she sat cross-legged. Seeing her vagina made him want to "get a girl again."

On one occasion, appellant and J.M. went into her mother's room to watch television. J.M. grabbed the neck massager from on top of the dresser and asked appellant to put her on the top shelf of the closet. He complied, and she began using it between her legs. On a different occasion they lay together on his bedding, with one of his arms underneath her head and his other arm on her knee or side. Once, they were at her house and appellant lifted her up to the bathroom sink so she could wash her hands. He noticed her legs were sticky and removed her underwear. His hand might have touched her as he splashed water on her.

Jury Question

During deliberations, the jury asked questions about the proof required to convict appellant of counts 2 through 10. (§ 288, subd. (a).) Those counts charged appellant with committing lewd and lascivious acts against J.M. between July 2007 and January 2008 in an apartment in Atascadero.[2] The nature of each act was not specified.

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[2] Counts 2 through 10 in the amended information contained the identical language, charging that "[o]n or about AND BETWEEN JULY 2007 TO JANUARY 2008, in the County of San Luis Obispo, the crime of LEWD ACT UPON A CHILD, in violation of Penal Code section 288(A), a FELONY, was committed by [appellant], who did willfully, unlawfully, and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of [J.M.], a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant(s) and the said child APT IN ATASCADERO."

In his closing argument, the prosecutor stated that count 1 concerned oral copulation. Counts 2 through 10 referred appellant's touching in the closet, on J.M.'s chest and buttocks, lifting her up and kissing her. The prosecutor indicated that counts 2 through 5 were the touching that occurred in both appellant's apartment and J.M.'s apartment. Counsel referred to an act when J.M. allegedly put her hand on appellant's crotch. On several occasions appellant had touched J.M., and she pushed his hand away. Counsel specified that count 6 referred to touching of J.M.'s chest; count 7 was touching her buttocks; count 8 was appellant's lifting J.M. up frequently, with his fingers near her vagina and thumb between her buttocks. Counts 9 and 10 referred to the kissing.

The jury sent the court a note, asking: "For counts 2-10, what are the specifics of each count? Which count involves touching of what?" The court spoke to the jury and said that counts 2 through 10 concerned "a broad spectrum of time that these things occurred." It told the jurors:

"You have to decide the facts, and you have to decide, based on the evidence, first of all, if any touching took place.

"Let's assume you decide some touching took place. Then, of course, you're going to decide whether they were done with a sexual intent. Only you can decide how many touchings, that qualify under the law, occurred, if any. . . .

"You do have to agree as to any given count. . . .

"You might find evidence that there were fewer touchings proven than the counts indicate. You might find that there [were] more touchings proven than the counts indicated.

"But, as to any given count, once you've isolated an incident, if you so decide that incident . . . happened, touching the shoulders -- it didn't happen here -- and that there was a requisite intent, well, then you'd say as to count 2 you find the person guilty or not guilty and you just go down that way."

The foreperson asked: "Just so I can clarify. So each count does not specifically address any -- it's up to us to determine which count goes to any particular touching?" The court replied: "Exactly. That's correct. [¶] I can see how that would be

confusing. Yeah. It doesn't allege; right, on or about touched the booty, on or about touched the breast or whatever. It's not that way. [¶] Does that help all of you folks?" The jury answered affirmatively. Several hours later, it rendered a verdict, finding appellant guilty on all counts.

DISCUSSION

Jury Unanimity

Appellant argues that he was entitled to a sua sponte instruction on jury unanimity (CALCRIM No. 3501).[3] He contends that the evidence consisted of "vague and generic evidence with undifferentiated and unspecified dates, times and places." It gave neither a standard "specific acts" jury instruction (CALCRIM No. 3500) nor a modified unanimity instruction (CALCRIM No. 3501).

The State Constitution guarantees a criminal defendant a unanimous jury verdict. (Cal. Const., art. 1, § 16.) Where the jury receives evidence of more than one factual basis for a conviction, either the prosecution must select one act to prove the offense, or the court must instruct the jury that all the jurors must agree that the defendant committed the same act or acts. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Jones* (1990) 51 Cal.3d 294, 304-305 (*Jones*); *People v. Mayer* (2003) 108 Cal.App.4th 403, 418.)

In *Jones*, the Supreme Court established the criteria for determining the admissibility of generic evidence of molestation. (*Jones, supra*, 51 Cal.3d at p. 316.) It also addressed the circumstances under which a unanimity instruction should be given.

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[3] CALCRIM No. 3501 provides: "The defendant is charged with ____ [in Count[s] ____] sometime during the period of _____ to _____. . . . The People have presented evidence of more than one act to prove that the defendant committed (this/these) offense[s]. You must not find the defendant guilty unless: . . . 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed for each offense[] . . . OR . . . 2. You all agree that the People have proved that the defendant committed all of the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of events as charged]."

(*Id*. at pp. 321-322.) In child molestation cases, generic testimony is sometimes presented, in which a victim describes multiple incidents that are not differentiated by dates, times, or places. A victim who has been repeatedly molested over a period of time "may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Id.* at p. 305.)

The *Jones* court held that generic testimony can support a conviction if it describes (1) the kind of acts committed; (2) the number of acts committed; and (3) the general time period in which the acts occurred. (*Jones*, *supra*, 51 Cal.3d at p. 316.) All must be described with sufficient specificity to support each allegation. (*Ibid.*) If the foregoing criteria are met, and there is no reasonable likelihood of juror disagreement as to particular acts, the jury should be given a modified unanimity instruction which allows a conviction if either (1) the jurors unanimously agree that the defendant committed the same specific act, or (2) the jurors unanimously agree the defendant committed all the acts described by the victim. (*Id.* at pp. 321-322.)

Appellant argues that the *Jones* criteria has not been satisfied, rendering J.M.'s testimony inadmissible. Alternatively, he asserts that, *if* the criteria have been met, *Jones* is nevertheless inapplicable because it involved a minor who lived continuously with the perpetrator, while appellant was a neighbor with only periodic contact.

J.M., although only four years old, was able to communicate the type and frequency of abuse she experienced, the location and relative time period. This she accomplished via her testimony and her interview with Nix, through an anatomical drawing and by pointing to her body. She met the criteria enumerated in *Jones*. Appellant, by his own testimony, provided evidence of a single incident (count 1) involving oral copulation, which occurred near the time of his birthday in January 2008.

We reject appellant's argument that *Jones* is inapplicable because he did not live with J.M. The court did not limit the use of generic testimony in child molestation cases to a victim who lives with her abuser. We also reject appellant's due process claim because *Jones* established that generic testimony does not violate a defendant's right to

fair notice of the charges against him or his right to present a defense. (*Jones, supra,* 51 Cal.3d at pp. 318-319.)

Although a written modified unanimity instruction was not given, any error was harmless. The court informed the jury that it must decide the facts based upon the evidence, and that all jurors must agree as to each count. The prosecutor's statements at closing offered the jury a summary of the available evidence. The jury's agreement as to appellant's acts was demonstrated by the verdicts of guilt it returned on all 10 counts.

Courts have recognized a split of authority on the standard of prejudice in failing to give a unanimity instruction. (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1448-1449.) Some cases hold that the prejudice must be deemed harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [*Chapman* standard].) Others apply the standard articulated under *People v. Watson* (1956) 46 Cal.2d 818, 836, whether the defendant would have obtained a more favorable verdict had the unanimity instruction been given. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561- 562 [*Watson* standard].) Under either standard, the error was harmless.

Hearsay and Sufficiency of the Evidence

Appellant argues that J.M.'s interview with Nix and his police interview were both inadmissible hearsay. Appellant has waived these arguments by failing to object to the admission of this evidence at trial. (Evid. Code, § 353; *People v. Harris* (2005) 37 Cal.4th 310, 335.)

As to J.M.'s interview, appellant claims that it could only have been admitted under Evidence Code section 1360, which provides an exception to the hearsay rule for a minor victim's statements concerning child abuse. This section permits the admission of a minor's statement of child abuse if (1) the court conducts a hearing to determine the reliability of the minor's testimony; and (2) the minor either testified or is unavailable as a witness and there is corroborating evidence of abuse. (§ Evid. Code, § 1360, subd. (a).) There is no indication in the record that J.M.'s interview was admitted pursuant to section 1360 or that appellant requested a hearing under this section.

As to appellant's police interview, he speculates his statement must have been admitted under Evidence Code section 1221, concerning adoptive admissions. He contends that the interview was not an adoptive admission because it contained leading questions and his "flat denial[s]."

Even had the foregoing evidence been excluded, the jury still had before it the recorded telephone call between appellant and Jodi, the testimony of J.M. and her brother, and appellant's testimony. Appellant testified that he loved J.M. and they had a special connection. He kissed appellant on the lips, navel and toes and they lay together on his bed while he touched her. He would lift her onto the sink and look at her vagina while he shaved. This made him want "to get a girl again." On his birthday she offered him her "butt hole," but he refused, and she became despondent. She rolled over and, in order to comfort her, he kissed the air near her vagina. He watched her use a neck massager between her legs and once removed her underwear and washed her crotch.

In the recorded telephone conversation, appellant told Jodi that J.M. wanted to have sex with him, and had once squeezed his crotch. J.M. testified that appellant had kissed her "pee pee," and lips, touched her buttocks and "heart" and lifted her onto the sink while he brushed his teeth. J.M.'s brother testified to seeing J.M. enter and leave appellant's house wearing only her underwear. Substantial evidence supports the verdicts on counts 2 through 10.

Ineffective Assistance of Counsel

Appellant claims that counsel was ineffective for failing to object to the admission of J.M.'s testimony and her interview with Nix. He contends that there was no reasonable explanation in the record as to why defense counsel did not request an Evidence Code section 1360 hearing. To establish an ineffective assistance of counsel claim, the defendant bears the burden of demonstrating that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that the deficiencies resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) An ineffective assistance of counsel claim can be made on direct appeal when counsel's deficient performance is

clear from the record or there could be no satisfactory explanation for counsel's actions. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Appellant has not met his burden. Because we do not know under what hearsay exception this evidence was admitted, we are unable to determine if counsel should have filed a request for an Evidence Code section 1360 hearing. In any event, there was no prejudice. J.M.'s statements to Nix were cumulative of appellant's statements to Jodi, Detective Aanerud, and appellant's trial testimony.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Roger Randall, Judge

Superior Court County of San Luis Obispo

Richard C. Gilman, under appointment by the Court of Appeal, for Defendant and Appellant.

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